it is submitted that this argument overlooks both that to afford a justification the command must seem proper, and that, whatever may be the defense of the private, the injured citizen still has his remedy against the officer who issued the illegal order.[14]

DE FACTO OFFICERS. — The *de facto* doctrine is based on the paramount necessity of protecting the public.[1] With regard to the public the acts of a *de facto* officer are as valid as those of a *de jure* officer. To force outsiders to deal with the former at their peril or to try his title to office on every occasion would be grossly unfair and thoroughly impracticable. Such considerations have led the courts to extend the older and more technical definition [2] of a *de facto* officer to include any one who without legal authority is performing the duties of an office, and "has the reputation of being the officer he assumes to be." [3] The public is also more fully protected if such an officer is held to strict accountability. His defective title, therefore, does not release him from liability for such acts as would be torts or crimes, if done by the *de jure* officer.[4]

Although he might thus incur many burdens, the common law gave him no corresponding benefits. For he could not deny that he was not in fact an "officer." In this matter the common law was rigid but perfectly consistent. A public office was a delegation of certain sovereign powers [5] and was treated in a way analogous to a grant of land.[6] The holder was said to be "seised of his office." If he was removed, his office still continued.[7] If a salary was annexed, it was an office "coupled with an interest." [8] Under such a view, the *de facto* holder was no better than a disseisor, and it followed logically that he was not entitled to any salary,[9] or if it had, in fact, been paid, it could be recovered from him by the *de jure* officer.[10] Such is the prevailing law at the present time.

But there has been a certain tendency to treat offices, and particularly the minor ones, as analogous to contracts of employment.[11] Certain courts have felt that as an officer is a servant of the people, his salary ought to depend upon the services he has rendered them.[12] Such considerations have caused them to relax the older common-law rule and permit the *de facto* officer to recover the salary of the office where there

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[14] The subject of this note under the English law is discussed in DICEY, THE LAW OF THE CONSTITUTION, 7 ed., Ch. VIII and IX.

[1] The leading American case on this subject is State *v.* Carroll, 38 Conn. 449. For a full treatment of this whole subject, see CONSTANTINEAU, THE DE FACTO DOCTRINE.

[2] The older view required "color of an election." Carleton *v.* People, 10 Mich. 250.

[3] Lord Ellenborough in King *v.* Village of Bedford Level, 6 East 356.

[4] Diggs *v.* State, 49 Ala. 311.

[5] United States *v.* Germaine, 99 U. S. 508.

[6] 2 Bl. Comm. 36.

[7] Thus, if an officer was removed for cause he was ineligible for reëlection until the complete term of his old office had expired. State *v.* Rose, 74 Kan. 262.

[8] State *v.* Stanley, 66 N. C. 59.

[9] Dolan *v.* New York, 68 N. Y. 274.

[10] Coughlin *v.* McElroy, 74 Conn. 397. See 15 HARV. L. REV. 675.

[11] Erwin *v.* Jersey City, 60 N. J. L. 141.

[12] Stuhr *v.* Curran, 44 N. J. L. 181.

was no *de jure* claimant.[13] *Peterson* v. *Benson*, 112 Pac. 801 (Utah). Some have gone further and have allowed him to set off such expenses as he had incurred against the claim of the *de jure* officer.[14] Beyond this, few courts have ventured.

These cases give relief upon essentially equitable grounds. If the doctrine of unjust enrichment is thus invoked, ought it not to be consistently applied? Ought not the recovery in the first class of cases and the extent of the set-off in the second to be limited to the amount that the state has been enriched or the *de jure* officer benefited? Then the true conception of an "office" will be left intact. The salary would still be a part of the office and both would belong to the *de jure* officer.[15] For he only is an "officer" to whom the sovereign power has delegated sovereign functions.

CONSTITUTIONALITY OF COMMON PROVISIONS IN PRIMARY ELECTION ACTS. — Primary election laws owe their creation to the corruption, abuse, and complex methods of the political caucus or convention of the past century.[1] They aim to simplify the difficulties of nomination for public office and enable the individual voter to exert the influence he deserves.[2] Legislative interference with political parties is justified on the basis of securing a free expression of the will of individual citizens by such reasonable regulation,[3] or on the ground that the plenary power of the legislature thus comes into play, since political parties are not mentioned in the Constitution,[4] or that the legislature having granted the privilege of the Australian ballot may condition its use.[5] These laws frequently stipulate that a party wishing to use the primary system must have polled a certain percentage of the general vote,[6] or in its primary must have polled a certain percentage of its own vote for a particular office at the last election.[7] Thus a recent Wisconsin case, *State ex rel. McGrael* v. *Phelps*, 128 N. W. 1041, holds a statute requiring that the aggregate number of votes cast for all candidates at the primary must equal twenty per cent of the party vote for governor at the preceding election constitutional, while a North Dakota case, *State ex rel. Dorval* v. *Hamilton*, 129 N. W. 916, reaches an opposite result where

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[13] Behan *v.* Davis, 3 Ariz. 399. The *de facto* officer may, however, sue for his salary in several states even when there is a *de jure* officer. Brinkerhoff *v.* Jersey City, 64 N. J. L. 225; Gorman *v.* Boise County Commissioners, 1 Idaho 655; Henderson *v.* Glynn, 2 Colo. App. 303; Reynolds *v.* McWilliams, 49 Ala. 552.

[14] Bier *v.* Gorrell, 30 W. Va. 95; Henderson *v.* Koenig, 192 Mo. 690; Mayfield *v.* Moore, 53 Ill. 428. See 23 HARV. L. REV. 571.

[15] Nichols *v.* MacLean, 101 N. Y. 526. The *de jure* officer can recover the salary even if he has been working elsewhere. Bullis *v.* The City of Chicago, 235 Ill. 472. But see Farrell *v.* City of Bridgeport, 45 Conn. 191.

[1] See 2 BRYCE, THE AMERICAN COMMONWEALTH, 3 ed., 98, 101–102.

[2] See MEYER, NOMINATING SYSTEMS, part II, ch. I. For an excellent article on recent primary legislation, see 5 ILL. L. REV. 203.

[3] Ladd *v.* Holmes, 40 Or. 167.

[4] See Kenneweg *v.* County Comm. of Allegany County, 102 Md. 119.

[5] Commonwealth *v.* Rogers, 181 Mass. 184.

[6] MINN. REVISED LAWS, 1905, ch. VI, § 182.

[7] WIS. LAWS OF 1909, ch. 477. See CAL. LAWS OF 1909, ch. 405.